IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AVA SLAUGHTER,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. H-05-3455**
	§	
JONES DAY,	§	
	§	
Defendant.	§	

DEFENDANT JONES DAY'S OPPOSITION TO
PLAINTIFF'S MOTION TO FILE AMENDED COMPLAINT

Defendant Jones Day files the following Opposition to Plaintiff's Motion to File Amended Complaint, and respectfully shows the Court the following:

INTRODUCTION

On September 19, 2005, Plaintiff Ava Slaughter served Defendant Jones Day with her Original Petition, which was filed in the 152nd Judicial District Court of Harris County, Texas, docketed as Cause No. 2005-57372. Jones Day removed the action to this Court on October 7, 2005. On January 9, 2006, this Court entered a Scheduling Order setting the deadline for motions to amend pleadings for March 3, 2006. The parties have completed a significant amount of discovery, including written discovery, Plaintiff's deposition, and the deposition of Defendant's principal witness.

On July 24, 2006, Plaintiff filed her Motion to File Amended Complaint, in which she seeks to amend her Complaint to add a claim of retaliation against Jones Day. Jones Day objects to Plaintiff's Motion to File Amended Compliant on the following grounds:

Dockets.Justia.com

- The Motion is untimely, and allowing the amendment would prejudice Jones Day in light of the significant amount of discovery that has been conducted in this case.
- Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted with respect to her newly-asserted claim of retaliation and, accordingly, Plaintiff's Motion is futile.
- To grant Plaintiff leave to file her Amended Complaint would be to allow Plaintiff to benefit from her own misconduct, resulting in an abuse of the judicial system.

Accordingly, Jones Day respectfully moves this Court to deny Plaintiff's Motion and to strike Plaintiff's Amended Complaint.

BACKGROUND

This is an action filed under the Texas Commission on Human Rights Act ("TCHRA") and 42 U.S.C. § 1981 ("§ 1981") by Plaintiff against Jones Day. Plaintiff alleges that Jones Day discriminated against her on the basis of her race when it did not select her for a managerial position at the Firm. Plaintiff now seeks to amend her complaint to assert a claim of retaliation against Jones Day.

In this lawsuit, Plaintiff complains that Jones Day's legitimate business decision to promote a qualified employee to the position of GIS Manager was based on her race. In fact, Plaintiff unreasonably believes she held the position previously, and according to Plaintiff, Jones Day unlawfully "demoted" her based on her race. Plaintiff remains a current Jones Day employee, and her basic job duties and compensation have remained unaffected since she first complained of alleged discrimination.

After filing this lawsuit against Jones Day, Plaintiff accessed and took copies of various Firm documents without authorization or any business reason to do so, thereby violating Firm policy. At the time that it was made aware of this breach of authority by Plaintiff, Jones Day also discovered that Plaintiff tape-recorded conversations within the Firm without the knowledge of the other participants in the conversation, in further violation of Firm policy. As a result of Plaintiff's misconduct, Jones Day counseled Plaintiff that her conduct violated Firm policy and advised Plaintiff that any future violation Firm policy may result in disciplinary action. It is this counseling report that forms the basis of Plaintiff's newly-asserted claim of retaliation.

ARGUMENT

Jones Day respectfully moves this Court to deny Plaintiff's Motion and strike her Amended Complaint. While Federal Rule of Civil Procedure 15 allows leave to amend pleadings "when justice so requires," such leave is by no means automatic. *See Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993); *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314, 320 (5th Cir. 1991). In deciding whether to grant leave to file an amended pleading, the court may consider such factors as undue delay, bad faith or dilatory motive on the part of the movant, undue prejudice to the opposing party, and futility of amendment. *See*, *e.g.*, *Wimm*, 3 F.3d at 139. For the reasons outlined herein, leave of court is not justified under the circumstances, and Plaintiff's Motion to File Amended Complaint should be denied.

A. Plaintiff's Amended Complaint is Untimely and Would Prejudice Jones Day

Under this Court's current Scheduling Order, the deadline for motions to amend pleadings was March 3, 2006. Plaintiff's Motion to File Amended Complaint, filed on July 24, 2006, represents an untimely attempt to amend her Complaint to assert a brand new cause of action against Jones Day. In light of the amount of discovery that has already been completed in this case, allowing Plaintiff to assert this additional cause of action would unduly prejudice Jones Day.

To date, the parties have conducted a significant amount of written discovery. In addition, Jones Day has taken Plaintiff's deposition, and Plaintiff has deposed Kevin Richardson, Jones Day's Office Administrator and a principal witness in the lawsuit. If Plaintiff is allowed to amend her complaint at this stage in the litigation, Jones Day will be unfairly prejudiced because it has not had a fair opportunity to prepare its defense to Plaintiff's retaliation claim. In order to properly defend this new claim, Jones Day will be forced to gather additional evidence, re-depose witnesses as necessary, and conduct additional discovery, resulting in undue prejudice to Jones Day.

Furthermore, Plaintiff has demonstrated undue delay in filing her Motion to File Amended Complaint. While Plaintiff took Mr. Richardson's deposition on July 12, 2006, Plaintiff's newly-asserted retaliation claim is premised upon a Counseling Report that she received on June 20, 2006 (*See* Plaintiff's Motion to File Amended Complaint, Ex. 1). Because Plaintiff could have raised her claim of retaliation before deposing Mr. Richardson, and properly examined Mr. Richardson at that time, Plaintiff has demonstrated undue delay in her effort to amend her Complaint. *See*, *e.g.*, *Jones v. Robinson Prop. Group, L.P.*, 427 F.3d 987 (5th Cir. 2005) (finding that a plaintiff's leave to amend to add retaliation claim was properly denied because the plaintiff could have presented the claim prior to the deposition of the employer's manager). Accordingly, Plaintiff's Motion to File Amended Complaint should be denied.

B. Because Plaintiff's Newly-Asserted Claim Would Not Withstand a Motion to Dismiss, Plaintiff's Motion is Futile

This Court should deny Plaintiff's Motion to File Amended Complaint because Plaintiff's newly-asserted claim of retaliation fails to state a claim upon which relief can be granted. Courts are justified in denying leave to amend when the proposed amendment would be futile. *Saavedra v. Murphy Oil U.S.A., Inc.*, 930 F.2d 1104, 1109 (5th Cir. 1991) (citing *Emory v. Texas State Bd. of Medical Examiners*, 748 F.2d 1023, 1027 (5th Cir. 1984)); *Matagorda Ventures v. Travelers Lloyds Ins. Co.*, 203 F. Supp. 2d 704, 719 (S.D. Tex. 2000). Because Plaintiff's amendment would not withstand a motion to dismiss, her Motion is futile and should be denied.

In her proposed Amended Complaint, Plaintiff fails to state a claim upon which relief can be granted with respect to her claim of retaliation because Jones Day's allegedly retaliatory action, even if true, was not materially adverse to Plaintiff. *See Burlington Northern and Santa Fe Railway Co. v. White*, No. 05-269, 126 S. Ct. 2405 (2006). In order to state a cause of action for retaliation, Plaintiff must plead facts sufficient to demonstrate that, if true, the retaliation in question has produced an injury or harm that a reasonable employee would have found to be materially adverse. *Id*. Trivial harms are insufficient to state a claim of retaliation. *Id*.

In her Amended Complaint, Plaintiff references a disciplinary counseling report in support of her claim that Jones Day retaliated against her for instituting this lawsuit. The counseling report did not revoke any of Plaintiff's employment privileges at Jones Day, nor did it alter her employment status at the Firm in any way. This allegedly retaliatory action did not produce an "injury or harm" that may be reasonably perceived to be "materially adverse" in any way. *Id*. Rather, this action constituted a mere "trivial harm," if it may even be considered harmful at all. *Id*. Accordingly, Plaintiff's Amended Complaint does not properly assert a cause of action for retaliation, and her amendment fails to state a claim upon which relief can be granted.

Moreover, Plaintiff has failed to allege with any level of specificity, or in other than conclusory terms, that Jones Day retaliated against her for her participation this lawsuit. Plaintiff asserts only that she was disciplined and that her disciplining would not have occurred but for her participation in this proceeding. She fails to allege in any way that her discipline was causally connected to this lawsuit, was otherwise unjustified, or that she was harmed by Jones Day's allegedly retaliatory act. Plaintiff's bare and conclusory allegations that Defendant disciplined her for violating Firm policy in order to prevent her from bringing charges of discrimination are insufficient to state a cause of action for retaliation. *See*, *e.g.*, *Roberson v. Alltel Information Servs.*, 373 F.3d 647, 654 (5th Cir. 2004) (determining that the plaintiff's subjective belief was insufficient to create an inference of his employer's discriminatory intent).

Courts are justified in denying leave to file a proposed amended complaint if the complaint does not state a claim upon which relief can be granted. *See*, *e.g.*, *Ricciuti v. N.Y.C. Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991) (when the plaintiff has submitted a proposed amended complaint, the court need not allow its filing if it does not state a claim upon which relief can be granted). Since Plaintiff has failed to allege and cannot prove an essential element necessary to state a claim of retaliation upon which relief can be granted, Plaintiff's amendment is futile, and the Court should deny Plaintiff's Motion to File Amended Complaint for the purpose of adding such a claim.

C. Granting Plaintiff's Motion Would Allow Her to Benefit From Her Own Misconduct

Finally, this Court should deny Plaintiff's Motion to Amend Complaint because to permit Plaintiff's proposed amendment would be to allow her to benefit from her own misconduct. Courts retain the discretion under Rule 15 to deny leave in order to thwart tactics that are dishonest or abusive. *See*, *e.g.*, *Walker v. United States*, 306 F. Supp. 2d 215, 220 (N.D.N.Y. 2004) (citing *Foman v. Davis*, 371 U.S. 178, 181 (1962)); *see also Atchinson v. District of Columbia*, 73 F.3d 418, 426 (D.C. Cir. 1996) (concluding that a court should take into account the actions of other parties when considering a request for leave to amend). Because Plaintiff's allegations of retaliation are premised upon events caused by her own wrongful actions, allowing Plaintiff to amend her Complaint would be against the interests of justice, and Plaintiff's Motion should be denied.

Plaintiff's retaliation claim is premised upon events arising solely out of her own wrongdoing at Jones Day. Specifically, when Jones Day's in-house investigator, David Williams, investigated Plaintiff's internal complaint of discrimination, Plaintiff tape-recorded her conversation with Mr. Williams without his consent. In addition, Plaintiff accessed the Firm's electronic files and took Firm documents, purportedly in support of her claims in this lawsuit, without appropriate authorization to do so. Both of these actions were against established Firm policy.

After learning that Plaintiff, a current employee, violated at least two Firm policies, Jones Day counseled Plaintiff by issuing her a written warning. Plaintiff's newly-asserted cause of action of retaliation in her Amended Complaint is based solely upon this written counseling. There is no dispute that Plaintiff violated Jones Day's policies in tape-recording a conversation with another Jones Day employee. Accordingly, to allow Plaintiff to amend her Complaint and assert a cause of action for retaliation would be to allow Plaintiff to directly benefit from her own misconduct. For these reasons, Jones Day respectfully requests that this Court strike Plaintiff's Amended Complaint.

WHEREFORE, PREMISES CONSIDERED, Defendant Jones Day prays that Plaintiff's Motion to File Amended Complaint be denied.

Dated: July 31, 2006

Respectfully submitted,

By: /s/ Shauna Johnson Clark (by permission Kelley Edwards)
Shauna Johnson Clark
State Bar No. 00790977
Federal I.D. No. 18235
Kelley Edwards
State Bar No. 24041775
Federal I.D. No. 560755
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: (713) 651-5151
Facsimile: (713) 651-5246

Attorney-In-Charge for Defendant
JONES DAY

OF COUNSEL:

FULBRIGHT & JAWORSKI L.L.P.

CERTIFICATE OF SERVICE

This pleading was served in compliance with Rule 5 of the Federal Rules of Civil Procedure by Certified Mail, Return Receipt Requested on July 31, 2006, on the following counsel of record:

Mr. Thomas Padgett, Jr.
LAGARDE LAW FIRM, P.C.
24 Greenway Plaza, Suite 400
Houston, Texas 77046

/s/ Kelley Edwards
Kelley Edwards

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AVA SLAUGHTER,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. H-05-3455**
	§	
JONES DAY,	§	
	§	
Defendant.	§	

ORDER

This Court, having considered Defendant Jones Day's Opposition to Plaintiff's Motion to File Amended Complaint, is of the opinion that good cause exists for denying Plaintiff's Motion to File Amended Complaint. It is therefore,

ORDERED that Plaintiff's Motion to File Amended Complaint is hereby DENIED.

SIGNED this ______ day of _________________, 2006.

____
SIM LAKE
UNITED STATES DISTRICT JUDGE